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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 991

JERRY G. SUMMERLIN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JERRY G. SUMMERLIN,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Jerry G. Summerlin, prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the office of the Clerk of that Court on November 3, 1964, affirming the judgment of conviction entered by the United States District Court for the District of Columbia on January 20, 1964, after a jury trial, during the period of December 9, 1963 through December 16, 1963; and to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit denying petitioner's motion for rehearing *en banc* entered in the office of the Clerk of that Court on January 13, 1965, affirming the judgment of the United States Court of Appeals for the District of

Columbia Circuit entered on November 3, 1964, which affirmed the judgment entered by the United States District Court for the District of Columbia on January 20, 1964, after a jury trial during the period of December 9, 1963, through December 16, 1963.

CITATIONS AS TO OPINIONS BELOW

The petitioner was found guilty by a jury on two counts of armed robbery in violation of Title 22, Section 2901 of the District of Columbia Code, 1961 Edition, as amended, and two counts of assault with a dangerous weapon in violation of Title 22, Section 502 of the District of Columbia Code, 1961 Edition, as amended, and one count of carrying a dangerous weapon without a license in violation of Title 22, Section 3204 of the District of Columbia Code, 1961 Edition, as amended, after a jury trial in the United States District Court for the District of Columbia, which lasted from December 9, 1963, through December 16, 1963. Thereafter the United States District Court for the District of Columbia did on January 20, 1964, enter a judgment of guilty upon the verdict of the jury for violations of the offenses above-referred to herein and thereafter the United States District Court for the District of Columbia imposed a sentence upon petitioner for a term of two to seven years. This was a single sentence imposed by the Court upon petitioner covering petitioner's conviction by the jury on all five counts contained in the indictment. Thereafter petitioner noted an appeal to the United States Court of Appeals for the District of Columbia Circuit, and on November 3, 1964, that Court affirmed the judgment of the District Court below appealed from in this cause in case No. 18,407, in the United States Court of Appeals for the District of Columbia Circuit. Thereafter on November 18, 1964, petitioner moved for an extension of time for filing a petition for rehearing *en banc*. On November 27, 1964, petitioner filed his petition for rehearing *en banc;* and on January 13,

1965, the United States Court of Appeals for the District of Columbia Circuit by per curiam order denied petitioner's petition for rehearing *en banc*.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the United States District Court for the District of Columbia below was entered on November 3, 1964; and the order denying petitioner's petition for rehearing *en banc* was entered on January 13, 1965. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the action of the trial Court in granting a judgment of acquittal to the co-defendant Garrett at the conclusion of the Government's case in chief, and in view of the manner in which the same was done and stated to the jury, create prejudice against petitioner, and the failure of the trial judge to *sua sponte* thereafter grant petitioner a mistrial, violate the Fifth Amendment's due process clause?

2. Did the failure of the trial Court to order a severance during the course of the trial *sua sponte* as the evidence in the case unfolded constitute such a prejudice to the rights of petitioner as to violate the Fifth Amendment's due process clause?

3. Did the trial Court's failure to instruct the jury properly during the trial of the case below, and particularly concerning burdens of proof, that although the prosecution must prove its case beyond a reasonable doubt, the petitioner's defense of alibi, need only be sufficient to raise a reasonable doubt of guilt, violate the Fifth Amendment's due process clause?

4. Did the absence of objections to the instructions of the trial Court generally, during the trial of the case below, and particularly the failure of petitioner's defense counsel below to object to the failure of the trial Court to instruct the jury concerning necessary degrees of proof to be established before guilt could be found, and the trial Court's further neglect to instruct the jury as to the degree of proof necessary as to the defendant's defense of alibi, constitute "plain error" and prejudice to petitioner, in violation of the Fifth Amendment's due process clause?

5. Was the petitioner denied his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States due to the patent incompetency of his defense counsel during the trial in the Court below?

STATUTES INVOLVED

The statutes involved are:

Title 22, Section 2901 of the D. C. Code—Whoever by force or violence whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another person anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (March 3, 1901, 31 Stat. 1322, ch. 854, Section 810)

Title 22, Section 502 of the D. C. Code—Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (31 Stat. 1321, Section 804).

Title 22, Section 3204 of the D. C. Code—No person shall within the District of Columbia carry either openly

or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in Title 22, Section 3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (July 8, 1932, 47 Stat. 651, ch. 465 Section 4; November 4, 1943, 57 Stat. 586, ch. 296, Aug. 4, 1947, 61 Stat. 743, ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, Section 204 (c).)

Fifth Amendment to the Constitution of the United States—No person shall * * * * in any criminal case * * * * be deprived of life, liberty or property without due process of law.

Sixth Amendment to the Constitution of the United States—In all criminal prosecutions the accused shall * * * * have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Jerry G. Summerlin, white, was charged in a five count indictment jointly with a co-defendant, James A. Garrett, a negro, alleging two counts of armed robbery, two counts of assault with a dangerous weapon, and one count of carrying a dangerous weapon.

The Government presented its case against petitioner and the co-defendant Garrett alleging that on to-wit July 28, 1963, petitioner and Garrett committed a robbery of the Miles-Long Sandwich Shop at 511 Morse Street, N. E. in the District of Columbia; that the victims of the robbery were Ellis Levy and Sidney Levy, proprietors of the

business establishment. The government contended that petitioner took two attache cases containing money from the alleged victims. The Government further contended that petitioner had a mask in the nature of a lady's nylon stocking over his face, and that after menacing the alleged robbery victims, Ellis Levy and Sidney Levy with a dangerous weapon, to-wit a pistol, that he departed the premises and ran to a white automobile, in which was seated a colored man as the driver, waiting in the same. That thereafter these two men drove off.

The Government contended further that later that day the alleged white car drove on to a food store parking lot and that simultaneously at that time a yellow Cadillac drove on to the same food store parking lot, it being driven by the defendant Garrett. Government witnesses further contended that the petitioner and the co-defendant Garrett removed two attache cases from the white car and placed them in the trunk of the yellow Cadillac, and the Government further contended that petitioner thereafter got into the white car and drove off, and the co-defendant Garrett got into the yellow Cadillac and drove off.

Government witnesses testified further that petitioner was arrested 32 days later. At the conclusion of the Government's case in chief after the testimony of some 14 or 15 witnesses produced by the prosecution, the trial Court below directed a judgment of acquittal on all five counts of the indictment as to the co-defendant Garrett, and the trial Court advised the jury that the case would resume as to the petitioner Summerlin.

During the course of the Government's case in chief, the record is replete with a void on the part of petitioner's defense counsel to protect his rights and is replete with a continuous recordation of utter failure and neglect to cross-examine the Government witnesses on behalf of petitioner. The record is replete with instances and occa-

sions where petitioner's defense counsel failed to interpose objections, when the same could and should have properly been made either to testimony elicited by the prosecutor from Government witnesses on direct examination, or to testimony elicited by Garrett's counsel on cross-examination of government witnesses, when the same adversely affected the rights of petitioner herein. The record is clear that during the direct examination of the Government witnesses the petitioner's defense counsel were apparently mute and unconcerned, and the record is further clear that during the cross-examination of Government witnesses by defense counsel for the co-defendant Garrett, petitioner's counsel were again apparently mute and unconcerned as to the rights of petitioner in this serious case. It is particularly remarkable, that petitioner's defense counsel were mute and unconcerned and failed to interpose normal, natural and proper objections on many and numerous occasions to the cross-examination of Government witnesses by counsel for the co-defendant Garrett, which cross-examination did not concern the co-defendant Garrett, and had nothing to do with his activities, all of this, during that time, redounding to the detriment and prejudice of petitioner herein in the presence and eyes of the jury.

At the conclusion of the Government's case in chief, the Court granted a judgment of acquittal and a directed verdict of not guilty on all five counts of the indictment as to the co-defendant, James A. Garrett. The trial Court below made statements to the jury regarding the absence of the co-defendant Garrett from the case, and notwithstanding the efforts of the trial Court to prevent prejudice therefrom to petitioner, it is respectfully submitted by petitioner herein that this action of the trial Court did prejudice him to the extent of warranting a mistrial.

Thereafter the petitioner presented his defense through four witnesses including himself. The testimony on behalf of petitioner unequivocally set forth and established an

alibi indicating petitioner's complete and total disassociation with the offenses charged against him in the indictment, at both the time and place of their alleged occurrence.

Thereafter the Court charged the jury, which petitioner submits was erroneous and to his detriment and prejudice. Petitioner submits that the trial Court in its charge failed to instruct the jury adequately concerning burdens of proof. Petitioner submits further, that the trial Court neglected, to his detriment and prejudice, to instruct the jury concerning the necessary degrees of proof to be established before guilt could be found, and further, neglected to instruct the jury as to the degree of proof required that the jury must and need consider in their deliberations concerning petitioner's defense of alibi as an effective defense in his own behalf. Petitioner states that the failure and neglect of the trial Court below in its charge to the jury constituted "plain error". Petitioner submits further, that the failure of petitioner's defense counsel to submit instructions to the Court for its consideration concerning defendant's rights and defense was "plain error"; and further, that the failure and neglect of petitioner's defense counsel to interpose objections to the trial Court's charge at the conclusion thereof was "plain error".

That upon completion of the Court's charge to the jury, the case was submitted to them for determination of the guilt or innocence of petitioner herein. The jury returned a verdict of guilty on all five counts of the indictment on which petitioner was charged therein.

Thereafter on December 21, 1963, petitioner's defense counsel filed a motion for a judgment of acquittal or in the alternative a new trial; and the said defense counsel failed to pursue the same, actually withdrawing said motion by praecipe on December 27, 1963; thus, said de-

fense counsel failed to pursue these motions to their ultimate, in defense of petitioner's rights in this case.

Thereafter the trial Court entered judgment, imposing a sentence of from two to seven years on petitioner, upon the jury's verdict of his guilt on all five counts of the indictment.

Petitioner submits that he was denied his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States, due not only to the prejudice caused him by errors of the Court, and "plain error" committed during the trial of his case, but further due to the patent incompetency of his defense counsel during the trial of his case below.

REASONS FOR GRANTING THE WRIT

I

Petitioner submits that the trial Court below erred in not granting him a mistrial *sua sponte* at the conclusion of the Government's case in chief, after the co-defendant Garrett was acquitted. In light of the manner in which the Court dismissed the case as to the co-defendant Garrett, as reflected by the record, proceeding with the trial of the petitioner alone constituted violation of the Fifth Amendment's due process clause.

The record of the trial below clearly reveals that counsel for the defendant Garrett conducted practically all of the cross-examination of Government witnesses who testified at the trial, and cross-examination was neglected by petitioner's defense counsel. Petitioner submits that the trial Court must have been aware that most of the testimony elicited on cross-examination of Government witnesses by counsel for the co-defendant Garrett, did not even concern his client, but on the contrary reflected upon petitioner and created a positive aura of prejudice to

petitioner as a defendant in this case. Yet, during all of this time, neither did petitioner's counsel nor did the Court *sua sponte* on its own motion see fit to interpose objections to such cross-examination; nor was the same cured by way of instructions to the jury that the testimony being elicited on cross-examination by Garrett's counsel should not be considered by the jury as applying to petitioner, Summerlin, by only as to the defendant Garrett. Petitioner submits that the Court, itself, on hearing such a cross-examination in its presence by Garrett's defense counsel should have *sua sponte* informed the jury that it applied only to the defendant Garrett, *a fortiori*, since petitioner's defense counsel did neither object to the same nor request the Court to so instruct the jury accordingly. The record will reflect that petitioner was particularly prejudiced when defendant Garrett's counsel insisted on compelling the Government to produce the lady's nylon stocking mask as evidence during cross-examination, when the same by no stretch of the imagination, according to the Government's case, could have been applicable to the defendant Garrett. Petitioner further submits that there is a grave question of the propriety of the admission of the so called nylon stocking mask into evidence, since no chain of possession of the same as a Government exhibit was unequivocally established prior to its admission, that is, from the time of allegedly finding the same by the police, to its admission into evidence at the trial, and all of this was done without objection by petitioner's defense counsel. The admission into evidence of this nylon stocking mask alone, as evidence against petitioner Summerlin, under these circumstances, was gross error, and this fact alone, it is submitted, warranted the trial judge to *sua sponte* declare a mistrial. See the case of *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946) wherein the Court said,

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial

for the purpose of assuring its proper conduct of the determining questions of law."

Also see *Wrightson* vs. *United States*, 222 F 2d 556, 95 U.S. App. D.C. 390.

II

Petitioner submits that during the presentation of the Government's case in chief conditions arose therein which should have made it obvious to the trial Judge to order a severance of trial of the petitioner herein from that of the co-defendant Garrett. The record of this case clearly reveals that the trial Court in the interests of justice should have unhesitatingly ordered such a severance so as to protect the rights of the petitioner herein. At more than one stage during the trial of this case, petitioner submits that it was the duty of the trial judge to *sua sponte* order a severance of the trial of these defendants to protect petitioner's rights under the Fifth Amendment and not violate the due process clause thereof. The record of this case obviously reveals a conflict of interest between the petitioner and the co-defendant Garrett during the course of the trial in the presentation of the Government's case in chief. Petitioner submits that where there is a conflict of interest between co-defendants during a trial, it is the duty of the trial Court to protect defendants' rights in a criminal case even to the extent of ordering a separate trial for each defendant. See the case of *DeLuna* vs. *United States* 308 F. 2d 140 (5th Cir.) (1962). Also see *Case* vs. *State of North Carolina* 315 F. 2d 743 (1963).

The trial Court should always be alert to the necessity and duty of granting a severance if the same is necessary to protect the rights of a defendant. See *Schaffer* v. *United States*, 362 U.S. 511 (1960), where the Court stated at page 516,

> "* * * We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. * * *"

Also see *United States* v. *Wortman*, 26 F.R.D. 183, 197-98 (E.D. Ill. 1960); and *United States* v. *Stein*, 140 F. Supp. 761, 766 (S.D.N.Y. 1956).

III

The petitioner interposed the defense of alibi during his trial in the Court below. The record reflects that the Court during the course of its charge to the jury, on its own initiative did not instruct the jury as to petitioner's defense of alibi; and further, petitioner's own defense counsel did not call this fact to the attention of the Court. It is significant, petitioner submits, that the prosecutor, being aware that reversible error and prejudice might occur, due to this inadvertance or failure, was the one who called to the Court's attention the omission of the instruction on the defense of alibi in the Court's charge. Petitioner complains, however, that the trial Court failed to instruct the jury properly concerning burdens of proof. Petitioner insists that as a defendant in the trial below, that by offering his defense of alibi, it is not necessary to prove his alibi, but that it need only be sufficient to raise a reasonable doubt in the minds of the jury. This position is supported and founded in the law. See *United States* v. *Panchella*, 41 F. Supp. 850, District Ct. E. D. Penna., (1941) where the Court stated that:

> "* * * * 'It is equally well settled that, where an alibi defense is presented, a failure, even in the absence of a specific request, to instruct the jury as to the degree of persuasion required is reversible error, for the reason that the jury is not furnished with a standard for determining the legal value of the evidence.' The defendant had a right, even though

> no request was made for the instruction, to have the jury fully advised as to the difference between the burden resting upon the commonwealth to establish guilt, and that resting on the defendant with respect to the alibi set up."

This point obtained in the case of *Reavis* v. *United States*, 93 F. 2d 307, CCA—10th (1937). In the absence of a jury instruction on this point, it would be logical for a jury to assume that the two different narratives, made respectively in behalf of the Government and in behalf of the defendant, occupy equal footing before the jury, to the extent that the same measure could be used in evaluating both factual narratives.

This would be a prejudicial assumption because the prosecution must prove its case beyond a reasonable doubt in order to succeed, and establish petitioner's guilt, whereas the defense need only present sufficient evidence supporting an alibi to raise a reasonable doubt as to guilt. It is obviously improper for the jury to select as true the prosecution's narrative over the alibi narrative by a mere preponderance in a criminal case, and it is therefore a prejudicial error to send the case to the jury without instructing them on this point which is vital to a correct verdict.

Also, see *MacFarland* v. *United States*, 174 F. 2d 538, 85 U.S. App. D.C. 19 (1949) and *Cline* vs. *United States*, 20 F. 2d 494, CCA—8th (1927) where the Court stated,

> "Court, feeling duty to review facts for purpose of aiding jury in correct understanding, must do so in fairness to both litigants, and may not state facts on one side of issue only."

IV

Petitioner submits that the record is replete with numerous instances of error during the course of the trial

which should have been noticed and determined as "plain error" by the United States Court of Appeals for the District of Columbia Circuit and declared accordingly by that Court in the interests of justice and to protect petitioner's rights herein.

Petitioner submits that "plain error" was apparent at the conclusion of the Government's case in chief, when the trial Court failed to declare a mistrial. Also petitioner submits that "plain error" obtained in the Court's failure and refusal to order a severance on its own motion during the course of the presentation of the Government's evidence in its case in chief. Petitioner submits further that the charge of the Court contained elements which the appellate Court below should have readily recognized and denominated as "plain error" to the end of protecting petitioner's rights in the premises. Petitioner urges further that failure of the trial Court to instruct the jury concerning the necessary degrees of proof to be established by the Government before guilt could have been found, and the Court's further failure to instruct the jury as to the degree of proof needed, attending defendant's defense of alibi, all for the consideration of the jury, constituted "plain error" to the prejudice of the petitioner.

Petitioner submits that failure of the appellate court below to note the existence of "plain error" and to accordingly recognize and act upon the same, that is, reversing the judgment of the trial Court below, violated petitioner's rights under the Fifth Amendment's due process clause; and the appellate court failed to act in conformity with Rule 52(b) of the Federal Rules of Criminal Procedure in not recognizing and acting upon "plain error" committed in the trial Court below all to the detriment and prejudice of the petitioner. It is an immutable principle that an appellate court has not only the right, but the duty to correct "plain error" which redounds to the detriment of the defendant. See *Wrightson* vs. *United*

States, supra. In the case of *Meadows* v. *United States*, 82 F. 2d 881, 65 App. D.C. 275, (1936) the Court stated:

> "If plain error vital to the defendant has been committed, it may be noticed and corrected on appeal, notwithstanding absence of objection and exception (Rules of Practice and Procedure in Criminal Cases, rule 9, 28 U.S.C.A. following section 723a; Supreme Court Rules, rule 8, 28 U.S.C.A. following section 354)."

and also in *State* vs. *Williams*, 189, A 2d 193, Supreme Court of New Jersey (1963) the Court stated,

> "Plain error is error possessing clear capacity to bring about unjust result."

Notwithstanding the fact that petitioner's defense counsel in the trial below failed to interpose objections and failed to note exceptions to the charge of the trial Court below, "plain error" should have been found by the United States Court of Appeals for the District of Columbia Circuit and that Court should have accordingly reversed the judgment of the trial Court below. Other cases approving review where no exception has been taken include *Barry* v. *United States*, 287 F. 2d. 340, 109 U.S. App. D. C. 301 (1961); *United States* v. *Millpax, Inc.*, 313 F. 2d. 152, CCA-7th (1963); *Brown* v. *United States*, 314 F. 2d. 293, CCA -9th (1963); *Silber* v. *United States*, 370 U.S. 717, 82 S. Ct. 1287 (1962); *Durham* v. *United States*, 237 F. 2d. 760, 99 U.S. App. D.C. 132 (1956); and *Harris* v. *United States*, 299 F. 2d. 931 112 U.S. App. D.C. 100 (1962)

V

Petitioner submits that he was denied his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States due to the patent incompetence of his defense counsel during the trial of his case in the trial Court below.

The right of defendant to adequate and competent counsel under the Sixth Amendment of the Constitution of the United States has long been recognized. See *Glasser* v. *United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680. A classic case on this point is the case of *State* v. *Jones*, 12 Mo. App. 93, where the Court held forth at length on the duties and obligations of defense counsel in a criminal case in order to secure a fair and impartial trial for a defendant, he being entitled to receive competent and effective assistance of counsel in the protection of his rights and in his defense. Also see *Wrightson* vs. *United States*, supra.

In the case of *Scott* v. *District of Columbia*, 99 A. 2d 641, the Court held clearly that a defendant in a criminal trial is entitled to the undivided and undiluted fidelity of counsel for defense. The Court stated in *Scott* v. *District of Columbia*, supra, at page 643,

> "Like the Supreme Court in *Glasser*, we do not know just how much prejudice resulted to defendant, nor does it matter. 'To determine the precise degree of prejudice sustained by (defendant) * * * * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser*, supra, 315 U.S. at pages 75-76, 62 S. Ct. at page 467, 86 L. Ed. 680; see also *Coplon* v. *United States*, 89 U.S. App. D. C. 103, 191 F. 2d 749, certiorari denied, 342 U.S. 926, 72 S. Ct. 363, 96 L. Ed. 690; and *Cadwell* v. *United States*, D. C. Cir, 205 F 2d. 879."

The protection of the fundamental and basic rights of a defendant in a criminal trial should be and must be always protected and vigilantly secured under our system of criminal jurisprudence to the end that all defendants, including the petitioner in the case at bar, will

be assured not only a fair and impartial trial by a jury, but that his rights under the Fifth and Sixth Amendments of the Constitution of the United States will not be meaningless. See the cases of *Minker* v. *United States*, 85 F. 2d 425, *Nigro* v. *United States*, 117 F. 2d 624, 133 A.L.R. 1128 and *Payton* v. *United States*, 222 F. 2d 794, 96 U.S. App. D. C. 1.

CONCLUSION

For the foregoing reasons stated herein, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 991

JERRY G. SUMMERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed the conviction without opinion (R. 1).

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1964. A petition for rehearing *en banc* was denied on January 13, 1965. By order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to and including March 14, 1965 (a Sunday). The petition for a writ of certiorari was filed on March 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

770-063—65

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in failing to declare, *sua sponte,* a mistrial or in failing to order, *sua sponte,* a severance of petitioner's case from that of his co-defendant.

2. Whether the district court's instructions on the defense of alibi were correct.

3. Whether petitioner received adequate representation from his two retained defense counsel at trial.

STATEMENT

After a trial by jury in the United States District Court for the District of Columbia, petitioner was convicted of two counts of robbery, two counts of assult with a dangerous weapon, and one count of carrying a dangerous weapon, in violation of 22 D.C. Code §§ 2901, 502, and 3204 respectively (Tr. 685–686). He was sentenced to imprisonment for a period of from two to seven years.

The sufficiency of the evidence is not questioned; it may be summarized as follows:

On July 28, 1963, as Ellis Levy, accompanied by his nephew, was opening his Washington, D.C., sandwich shop for the day's business, petitioner approached from behind, pushed Levy violently into the store, and then spun Levy around (Tr. 23–24, 27–28). Petitioner, who was wearing a stocking mask and carrying a nickle-plated revolver, stated, "this is a holdup, give me your money" (Tr. 24). He then took from Levy an attache case which contained $1,800, and forced Levy and his nephew to face the wall (Tr. 24–25). Levy attempted to turn around, whereupon petitioner

struck him from behind with the revolver and caused him to fall to the floor (Tr. 25).

When Levy's brother, Sidney, arrived at the store a few minutes later, he too was accosted by petitioner, spun around, and told to "get in there and give me your money" (Tr. 26, 36, 55–56). Sidney Levy dropped an attache case containing about $1,300, which petitioner retrieved (Tr. 57). Petitioner then forced the Levy brothers and the nephew to go to the back of the store, and fled with the two attache cases and the money they contained (Tr. 26, 57).

Witnesses saw petitioner running from the store, carrying the two brown attache cases, and also saw him remove the stocking mask and transfer one of the attache cases to another person about two blocks from the sandwich shop (Tr. 64–70, 84–89, 117–118). Petitioner was then seen entering a white Ford automobile with one of the attache cases, while petitioner's companion entered another automobile with the other attache case (Tr. 85–89, 145). One or two hours later (Tr. 148, 158), other witnesses saw petitioner meet with his co-defendant, James A. Garrett,[1] and transfer two brown attache cases from a white Ford to Garrett's automobile (Tr. 149–150, 226–230). Both cars then drove away without petitioner, who walked off (Tr. 152).

Petitioner was arrested on September 2, 1963, and was later identified at police lineups by both of the

[1] James A. Garrett, also charged in the five counts of the indictment, successfully moved for acquittal as to all counts at the conclusion of the government's case (Tr. 570). Petitioner's similar motion was denied (Tr. 571–573).

Levy brothers and the other witnesses (Tr. 27, 46, 60, 86–87, 153, 229–230, 291).

ARGUMENT

1. Without having raised either issue at trial or before the court of appeals, petitioner now asserts that the trial judge erred in failing *sua sponte* to declare a mistrial or order a severance (Pet. 9–12, 14). He argues that he was entitled to such relief because: (1) co-defendant Garrett's counsel conducted most of the cross-examination of government witnesses and elicited testimony which did not concern petitioner; (2) Garrett's counsel compelled the government to produce the stocking mask and introduce it in evidence; and (3) Garrett was acquitted at the conclusion of the government's case (Pet. 9–10). There was, however, no conflict of interest between petitioner and co-defendant Garrett. Petitioner's defense was that of alibi. Garrett's defense was that: (1) the witnesses were mistaken in their identification of petitioner, and since petitioner did not commit the crime, petitioner's meeting with Garrett was innocent; or (2) the witnesses were mistaken in their identification of Garrett. Neither of Garrett's defense theories conflicted with petitioner's defense of alibi, and one of them—mistaken identification—supported petitioner's defense.

While counsel for Garrett did conduct most of the cross-examination of government witnesses, the examination consisted of an attempt to show that petitioner did not commit the robbery, or that the individual to whom petitioner later transferred one of the attache

cases was not Garrett (Tr. 37–48, 53–54, 95–119, 122–133, 134–144, 158–201, 205–217, 236–253, 254–260, 312–317, 332–349, 394–403, 405–408, 409–425, 455–461, 466–467, 504–506, 536–544). Consequently, such cross examination was not harmful to petitioner's defense. If it tended to show that petitioner was not the individual who committed the robbery, it supported petitioner's defense of alibi; and if it tended to show that Garrett was not involved at all, it was neutral vis-a-vis petitioner's defense. Petitioner's two defense counsel concentrated their cross-examination on testing the identification testimony of the witnesses and probing the accuracy of the witnesses' memories (Tr. 28–33, 62–63, 69–72, 89–95, 154–156, 225, 260–265, 354–364, 544–545).

Production of the stocking mask, and its introduction in evidence, was not in any way improper. As indicated above, Garrett's counsel was attempting to show that petitioner was not the individual who robbed the Levy brothers, and to the extent that he attacked the government's theory regarding the use of the stocking mask, he developed a line of defense helpful to petitioner.

The directed acquittal of Garrett at the conclusion of the government's case in no way prejudiced petitioner. At most, it was merely a determination that the government's evidence of Garrett's involvement was not sufficient to go to the jury, and did not aggravate or enhance petitioner's degree of involvement in the offense. The judge instructed the jurors not to speculate about the reasons for Garrett's acquittal, and advised them that Garrett's acquittal had no bear-

ing on petitioner's case (Tr. 584). This admonition was repeated in the general charge to the jury (Tr. 675–676).

2. The trial court instructed the jury that petitioner's defense was that of alibi, and then defined alibi as meaning the assertion that petitioner did not commit the crime and was not present at the scene of the offense when it was committed (Tr. 681). The court briefly mentioned the evidence petitioner had presented in support of his alibi (Tr. 681). It had previously instructed that the government had the burden of proving its case beyond a reasonable doubt and that the burden is never on the defendant to prove his innocence (Tr. 669–671). Under these circumstances, there was no requirement that the judge instruct on the degree of proof required to establish an alibi defense. *Goldsby* v. *United States,* 160 U.S. 70, 77. This is the rule which the District of Columbia has adopted for itself, (*Guthrie* v. *United States,* 207 F. 2d 19 (C.A.D.C.)) as a matter of local law.[2] See *Fisher* v. *United States,* 328 U.S. 463, 476.

3. Petitioner's allegations of incompetency of his retained counsel are wholly unsupported by the record of trial. During the course of the six-day trial, both

[2] *Panchella* v. *United States*, 41 F. Supp. 850 (E.D. Pa. 1941), cited by petitioner (Pet. 12), is inapposite because the trial court's instruction followed the state rule in that case, see *United States* v. *Marcus*, 166 F. 2d 497, 504, note 5 (C.A. 3). *Reavis* v. *United States*, 93 F. 2d 307 (C.A. 10), cited by petitioner, is inapposite because it held that a directed verdict of acquittal should have been entered due to the insufficiency of the evidence, noting that it was error to criticize the defense of alibi in the absence of an instruction that alibi is a complete defense (93 F. 2d at 309).

defense counsel were active on petitioner's behalf. They conducted extensive cross examination of government witnesses in order to test the accuracy and credibility of the testimony given (Tr. 28–33, 62–63, 69–72, 89–95, 154–156, 225, 260–265, 354–364, 544–545). Petitioner complains that his counsel did not cross examine enough, but overlooks the fact that most of the cross examination conducted by Garrett's counsel was directed to areas involved in petitioner's case, and further cross examination, in many instances, would have been repetitive. Petitioner also assails counsel for their failure to object at various times (Pet. 10), but fails to show any valid basis for objection.

At the beginning of the defense case, an extensive and detailed opening statement was made (Tr. 591–595). Petitioner's counsel called three witnesses to establish the defense of alibi, and then let petitioner develop his version of this case (Tr. 595–602, 605–607, 608–611, 613–618, 621–629, 631–632, 633–641, 663–664). The fact that the jury convicted petitioner is not surprising in view of the overwhelming evidence of his guilt, particularly the positive identification of petitioner as the robber, made by the victims and eyewitnesses (Tr. 27–28, 60–62, 286–287, 300–303). Under the circumstances of this case the conviction is no reflection on the competence of defense counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner for a writ of certiorari should be denied.

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OCTOBER TERM, 1964

JERRY G. SUMMERLIN,
Petitioner

against

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's order dated May 3, 1965, denying the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and therefore respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for writ of certiorari was denied without opinion. Petitioner herein submits that the failure of the trial court below to grant a severance of petitioner's trial from that of his co-defendant was manifest error; that this error on the part of the trial court below so prejudiced petitioner and his fundamental rights before

the jury, that this error could not be cured by the Court in its instructions, nor was the same so cured, before the case was submitted to the jury for its deliberations.

The failure of the Court to instruct the jury properly with respect to petitioner's defense of alibi was error, which deprived petitioner of his fundamental rights and due process under the Fifth Amendment to the Constitution of the United States. This deprivation of petitioner's fundamental rights was compounded by failure of his defense counsel to seek proper instructions by the trial Court to the jury and by his trial counsel's failure to object properly and timely to the Court's instructions to the jury. This, it is submitted, is not only plain error, but were conditions and circumstances in the trial of this case, which deprived petitioner of his rights under the Sixth Amendment to the Constitution of the United States.

A reasonably careful review of the record in this case, petitioner contends, clearly reveals that he was, indeed, deprived of his basic and fundamental rights under the Sixth Amendment to the Constitution of the United States. The record is replete with inactivity and instances and acts of omission on the part of this petitioner's trial defense counsel, during trial, which in actuality were tantamount, not only to representation by incompetent counsel in this case in violation of his rights under the Sixth Amendment, but further, petitioner was subjected to representation by trial defense counsel, who not only failed to adequately assist him, but actually prejudiced his rights. This fact is seen by the lack of cross-examination indulged in by petitioner's defense counsel; and further when his defense counsel did cross-examine government witnesses to the limited extent indulged in by them, they not only failed to help his cause and case, but actually harmed him by prejudicing his

rights and position in this case, by their inept cross-examinations.

It is remarkable that in the brief of the Government in opposition to petitioner's petition for writ of certiorari (Opp. 3) wherein a statement is made that witnesses saw petitioner "remove the stocking mask", when actually the record does not support this unequivocal statement.

POINT I

The Government's brief (Opp. page 3) contains the following,

> "Witnesses saw petitioner running from the store, carrying the two brown attache cases, and also saw him remove the stocking mask and transfer one of the attache cases to another person about two blocks from the sandwich shop. (Tr. 64-70, 84-89, 117-118)."

Petitioner submits that a careful and articulate examination of the transcript above, does not reveal any testimony by any witness which states that petitioner removed "the stocking mask" as stated therein. The nearest approach to such an unequivocal statement by the Government, that petitioner removed "the stocking mask" seems to be a statement by a witness responding on direct examination as follows (Tr. 66),

> "A. I seen another guy come through the parking lot, running. He throwed something down out of his hand."

and subsequently on cross-examination as follows (Tr. 70-71)

> "A. They throw it down at the light pole. I saw him drop something out of his hand when the other one came from the parking lot, but I didn't know what it was."

Petitioner submits that there is nothing else in the entire record in this case which supports the Government's unequivocal statement (Opp. 3) that witnesses saw him "remove the stocking mask". It is obvious that this garbled testimony of the Government witness (Tr. 66),

> "A. I seen another guy come through the parking lot, running. He throwed something down out of his hand."

and Tr. 70-71

> "A. They throw it down at the light pole. I saw him drop something out of his hand when the other one came from the parking lot, but I didn't know what it was."

is conflicting in itself, and had no meaning to help the jury determine the issue raised by the alleged mask and its removal, attributed to petitioner herein. This prejudice concerning the alleged mask and its alleged removal by petitioner herein was totally unsupported by any adequate or probative evidence introduced into the trial of this case, and this damaging inference permeating the minds of the jury, unsupported by evidence, was not cured by the Court. This damage to petitioner's rights was compounded by the subsequent admission into evidence of a nylon stocking mask, brought into this trial to the prejudice of petitioner herein, and at the insistence of counsel for co-defendant Garrett. Consequently petitioner urges that this incurable harm to his rights was never corrected nor sought to be corrected by the Court, and the resulting prejudice to him was reflected in the verdict of the jury.

POINT II

Petitioner submits that as urged before, the failure of the trial Court to grant a severance *sua sponte* during the course of the trial or at the conclusion of the Gov-

ernment's case in chief constituted error in violation of petitioner's rights under the Fifth Amendment's due process clause. Petitioner urges further, that in the light of the Government's case in chief against petitioner and the co-defendant, which resulted in the trial Court's directing a judgment of acquittal on all counts of the indictment against the co-defendant Garrett, created a condition and climate which warranted the trial Court in directing that the case against petitioner should not proceed any further and that a mistrial should have been declared therein. This is urged, since the minds of the jurors were filled with testimony damaging to the rights of the petitioner herein, which was elicited on cross-examination by counsel for the co-defendant Garrett, and not objected to by petitioner's own defense counsel. Petitioner submits that counsel for co-defendant Garrett during the entire trial not only dominated cross-examination of Government witnesses, but skilfully manipulated the same so as to exculpate the co-defendant from any and all blame or criminal activity with respect to any of the five counts contained in the indictment and place the onus of alleged criminal activity as to all counts of this indictment upon petitioner herein. It is submitted that the trial Court below should have not permitted this to exist or obtain and accordingly should have declared a mistrial at the conclusion of the Government's case in chief; or at least, petitioner submits that since the Court did not see fit during the course of the presentation of the Government's case in chief to order a severance with respect to the trial of petitioner herein a mistrial should have been declared by the trial Court. See the case of *Bollenbach* v. *United States*, 326 P. S. 607, 612 (1946) and *Wrightson* v. *United States*, 22 F 2d 556, 95 U. S. App. D. C. 390.

POINT III

The petitioner's defense of alibi was not sufficiently explained to the jury by the trial Court below. Petitioner submits that since he offered evidence of alibi and took the witness stand himself to buttress his defense, that it was incumbent upon the trial Court below to fully protect his rights by making clear to the jury the full import and meaning of his defense in this case. In this connection, petitioner submits that he was entitled to special and specific instructions with respect to his defense of alibi even if it necessitated a reasonably lengthy and detailed explanation of the same by the Court in its instructions to the jury. Petitioner was entitled to have his defense and his position in this case explained to the jury as clearly and unequivocally as any other facet of the trial was explained and detailed to the jury by the Court in its instructions. Failure to do so by the trial Court, petitioner submits was error. Petitioner urges again that the jury should have been thoroughly advised of the two different narratives given at the trial of this case respectively on behalf of the Government and on behalf of the petitioner so that they could occupy equal footing before the jury during its deliberations and in the evaluation of the same. See *Reavis* v. *United States*, 93 F 2d 307 CCA—10th (1937) and *MacFarland* v. *United States*, 174 F 2d 538, 85 U. S. App. D. C. 19 (1949) and *Cline* v. *United States*, 20 F 2d 494, CCA—8th (1927).

POINT IV

Petitioner urges that his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States were violated and prejudiced due to the ineptness and incompetency of his defense counsel during the trial of this case in the Court below. It is obvious and fundamental that no where does this record reveal

that counsel for the co-defendant Garrett was counsel for petitioner herein, nor was he ever hired or commissioned by petitioner to act as his counsel in this case. Hence, petitioner submits his trial counsel were duty bound to be vigilant and alert during all stages and proceedings of the trial in order to protect his rights and to defend him, the petitioner, and him alone.

Petitioner submits that references in the Government's brief (Opp. 4-7) suggest that counsel for co-defendant Garrett actually aided and assisted petitioner in his defense in the trial below. With respect to these references, inferences and statements, of course, petitioner can not agree in any measure and accordingly does not agree with the same. On the contrary, petitioner urges that due to his defense counsel's indifference to his rights, and ineptness, and yes, even practically their refusal to protect his rights with timely objections and by allowing Garrett's defense counsel to exculpate the co-defendant Garrett from alleged responsibility for criminal activity in all five counts of the indictment at the expense of throwing all of the onus of alleged criminal activity on the back and person of petitioner herein, all to his detriment, did, indeed, prejudice petitioner and deny unto him his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States. The transcript references in the Government's brief in opposition (Opp. 7) referring to alleged extensive cross-examination of Government witnesses by petitioner' defense counsel cover only 27 and one-half pages out of a transcript of record and proceedings containing 686 pages. It is submitted that this is minimal cross-examination, indeed, in light of the serious charges contained in the five counts of the indictment against petitioner herein. An examination of the record unequivocally reveals that such cross-examination was not extensive at all, the statement contained in the brief of the Government (Opp. 7) to the contrary notwithstanding.

It is submitted that petitioner should not suffer, nor should he be prejudiced or denied his rights under the Fifth and Sixth Amendment to the Constitution of the United States because of the indifference of, or the lack of competence of his defense counsel. See the cases of *Minker* v. *United States*, 85 F 2d 425, *Nigro* v. *United States*, 117 F 2d 624, 133 A.L.R. 1128 and *Payton* v. *United States*, 222 F 2d 794, 96 U.S. App. D.C. 1.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JOSIAH LYMAN
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Josiah Lyman, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58, Subdivisions 1. and 2. of the Rules of this Court.

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